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No. 91-

In the Supreme Court of the United States

October Term, 1991

NATIONAL STEEL CORPORATION,
Petitioner,

vs.

Arthur Dale White, James Anderson, James H. Baker, Thomas A. Balon, Richard S. Barber, Larry G. Bell, David S. Bickler, Robert L. Billick, Edward Bittner, Todd A. Blair, Richard Blancato, Robert A. Bray, Jr., Harry V. Brown, Jr., James H. Browning, James William Bullock, Charles A. Clark, Edward Dhayer, Ralph Anthony DiBacco, William R. Duncan, Jr., Domenic F. Frio, Dorsey R. Garrett, William F. Garrison, James A. Gracie, III, Thomas M. Grishkevich, David R. Harbin, James W. Hazlett, Rena Hess, Phillip E. Johnson, Jerry G. Jones, Robert L. Jones, Joseph P. Karas, Bartley Robert Kirkbride, Lloyd A. Klages, David J. Kondik, Frank W. Kruger, Jr., Charles L. Lacey, Timothy C. Lawson, Ernest H. McCormick, Joseph W. Mayernick, Boley Dale Mermon, Patricia Mlodzik, Charles D. Murray, Dale E. Poole, Charles Prince, Larry C. Riggle, William B. Riggs, Robert J. Ryan, Jr., John S. Sciance, Kenneth M. Seiple, John R. Selmon, Jr., Dennis D. Shirer, Ronald L. Spring, Robert L. Sutton, Frederick C. Tate, Stephen F. Tucker, Hoy L. Van Horn, Frederick R. Welshans, Charles F. West, Donald L. White, John W. Cominsky, Walter F. Mrozek, Dominic A. Tedeschi, Jr.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Are state law claims which assert breach of individual contracts to return employees to their former collective bargaining unit positions, and to restore to them the full measure of their bargaining unit seniority, sufficiently independent of the collective bargaining agreements addressing the ability to return to the unit, and which create and define unit seniority, to escape federal preemption under Section 301(a) of the Labor-Management Relations Act, 29 U.S.C. §185(a)?

2. Does the federal common law of labor relations, require that these state law claims be recharacterized as federal claims justiciable only under federal law?

PARTIES TO THE PROCEEDINGS BELOW

The parties to the proceedings in both the district court and the court of appeals are identified in the caption of the case.

National Steel Corporation, Petitioner herein, is a privately held corporation. Thirty percent (30%) of the capital stock of National Steel is owned by NII Capital Corporation, a wholly-owned subsidiary of National Intergroup, Inc. ("NII"). NII is a publicly held corporation. The remaining seventy percent (70%) of the capital stock of National Steel Corporation is owned by N.K.K. U.S.A. Corporation ("NKK USA"). NKK USA is a wholly-owned subsidiary of NKK Corporation, a Japanese corporation.

National Steel Corporation (NSC) has an ownership interest in the following non-wholly owned subsidiaries, defined as a company subject to control by NSC: Mathies Coal Company. NSC owns 86.6% of the stock of Mathies Coal Company. The remainder of the stock of Mathies Coal Company is owned by Stelco Coal Company.

NII has an ownership interest in the following additional non-wholly owned subsidiaries: Foxmeyer Corporation and Starcom International Inc. NII owns approximately 67% of the stock of Foxmeyer Corporation, the remainder of which is publicly traded. Starcom International, Inc. is an inactive corporation and the remaining 20% of the stock is privately held.

Neither NKK USA nor NKK Corporation have non-wholly owned American subsidiaries.

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The opinion of the district court is reported at 742 F.Supp. 312 (N.D.W.V. 1989) and is reprinted in Appendix "A" at pp. 1a-69a. The opinion of the United States Court of Appeals for the Fourth Circuit is reported at 938 F.2d 474 (4th Cir. 1991) and is reprinted in Appendix "C" at pp. 83a-120a.

JURISDICTION

This Petition requests the Court to exercise its discretionary power of review on writ of certiorari, 28 U.S.C. §1254(1). The judgment of the Fourth Circuit Court of Appeals for which review is sought was entered on July 3, 1991. This Petition is filed within the time limits prescribed by 28 U.S.C. §2101(c).

PERTINENT STATUTES

This Petition raises issues concerning the preemptive scope of Section 301 of the Labor-Management Relations Act of 1947, 29 U.S.C. §185. Section 301 provides in relevant part as follows:

> (a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

STATEMENT OF THE CASE

A. Procedural History

Petitioner, National Steel Corporation ("National") for many years operated an integrated basic steelmaking plant located in Weirton, West Virginia.[1] The Respondents were initially employed in bargaining unit positions and later promoted to salaried first level plant management positions, i.e., foremen. At the time of their promotions, Respondents allege, *inter alia*, that National promised them that they could return to their former bargaining unit jobs if they later so desired and that upon a return, they would have their full seniority rights restored, i.e., be treated for seniority purposes as if they had never left the bargaining unit. This litigation arises out of the layoffs of Respondents at various times during 1982. When National laid off the Respondents from their management positions, it did not return them to the bargaining unit because the collective bargaining agreements ("CBAs") in effect at that time had been amended to preclude returns to the bargaining unit with restoration of seniority.

Respondents commenced an action in the Circuit Court of Hancock County, West Virginia alleging, *inter alia*, that they were third party beneficiaries to CBAs between National and the Independent Steelworkers Union ("ISU"), which agreements permitted them to return with restored seniority to the bargaining units represented by the ISU in the event of a reduction in force in the salaried ranks. Respondents alleged that National breached its third party contracts with them by negotiating

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[1]On January 11, 1984 Petitioner sold substantially all of the assets of its Weirton plant to the Weirton Steel Corporation. App. A at 67a. *See generally, Sutton v. Weirton Steel Division, Nat'l Steel Corp.*, 724 F.2d 406 (4th Cir. 1983), *cert. denied*, 467 U.S. 1205 (1984.)

with the ISU for the changes to the CBAs which eliminated the ability of former bargaining unit members to return to the bargaining units with restoration of bargaining unit seniority. Complaint, ¶¶ 84-86.

National removed the action to the United States District Court for the Northern District of West Virginia on the basis that Respondents' claims of breach of these third party contracts were completely preempted by §301 of the Labor-Management Relations Act, 29 U.S.C. §185(a). National also asserted that federal jurisdiction existed pursuant to 28 U.S.C. §1441(c), inasmuch as the citizenship of 55 of the 63 original plaintiffs was different than National's citizenship and the amount in controversy claimed by each plaintiff exceeded $10,000, exclusive of interest and costs. Ancillary jurisdiction was asserted over the eight non-diverse original plaintiffs. Respondents' motion for remand was denied.

The initial complaint has been amended twice. In the Amended Complaints, Respondents abandoned the theory that they were third party beneficiaries to the CBA. In place of this theory, Respondents contended that their alleged oral contracts were independent of the CBA. The parties engaged in extensive discovery which culminated in the filing of National's motion for summary judgment on, *inter alia*, the claim of breach of contract resulting from National's refusal to return Respondents to the collective bargaining units represented by the ISU. The district court granted National's motion with respect to the claims of the 42 plaintiffs party to Count 1 of the action, but denied it with respect to the 15 Count 3 plaintiffs. By Order dated February 12, 1990 the district court certified its partial denial of National's motion for immediate appeal pursuant to 28 U.S.C. §1292(b), and also entered

final judgment in accordance with Rule 54(b) of the Federal Rules of Civil Procedure. App. B at 79a, 81a. The Fourth Circuit Court of Appeals granted National's Petition for Leave To Appeal, and consolidated National's appeal with that taken by Respondents from the district court's final judgment. The Fourth Circuit issued its opinion, which affirmed in part, reversed in part and remanded the case to the district court, on July 3, 1991. App. C at 119a-120a. By Order filed July 30, 1991 the Circuit Court, on National's motion, recalled its mandate pending timely application to this Court for writ of certiorari.

B. Statement of Facts

1. The P&M Bargaining Unit

The ISU represented the hourly production and maintenance ("P&M") bargaining unit employees at National's former Weirton Division for many years. App. A at 9a n.6. The successive CBAs between National and the ISU recognized four (4) types of competitive seniority within the P&M bargaining unit. Those four types of seniority were: (1) Company Seniority, which was measured from the employee's first day of work (initial hire) within the P&M bargaining unit. Company Seniority, among other applications, was used to determine which employees ultimately were laid off "to the street" when a downturn in operations caused layoffs; (2) Department Seniority, which was measured from the employee's first day of permanent assignment to one of eleven seniority departments. Department Seniority, among other applications, was used to determine which employees within a department faced reduction from the department when a downturn in department operations occurred; (3) Sequence Seniority, which was measured from the employee's first day of permanent

assignment to an entry level job in a seniority sequence, or line-of-progression, within a department. Among other applications, Sequence Seniority determined the order of reductions from a sequence upon a downturn of operations in the sequence; and (4) Job Seniority, which was measured from the employee's first day of permanent assignment to a job in the job sequence or line-of-progression. Job Seniority, among other applications, determined the order in which employees would be reduced from their particular job in a job sequence when reductions occurred with respect to that job or job sequence.[2]

For many years before 1980, the P&M bargaining agreements contained language in their seniority provisions that addressed the seniority status of an employee who transferred out of the P&M bargaining unit and was later returned to that bargaining unit. In brief, the contracts provided that upon acceptance of a job outside the P&M bargaining unit, the employee forfeited his accumulated P&M bargaining unit seniority. If, however, the employee was later returned to the P&M bargaining unit, his previously accumulated Company Seniority would be restored and, in addition, the employee would be credited with additional Company Seniority for his time spent

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[2]As a result of a Consent Decree entered May 12, 1983 among National, the ISU and the Equal Employment Opportunity Commission, which resolved consolidated class action claims of race discrimination, an employee's Sequence Seniority date and Department Seniority date were deemed to be the same as his/her Company Seniority date for, *inter alia*, purposes of promotion and reduction. However, Job Seniority date was not altered by the Consent Decree. Section III of the Decree provided that the changes to the measures of seniority effected therein would be effective retroactively to November 1, 1982. See Consent Decree, *Allen v. Weirton Steel Division of National Steel Corp.*, Civil Action Nos. 69-30-W, 72-5-W, 80-75-W (May 12, 1983 N.D.W.Va.).

outside the P&M bargaining unit.[3] These provisions thus conferred an enhanced seniority status on employees who returned to bargaining unit positions from positions excluded from the unit. The pre-1980 CBAs did not set forth the mechanism by which a former bargaining unit employee could return to a P&M unit position; rather the contracts only addressed the seniority status of such an employee upon his return. *See* App. A at 21a-22a and nn. 12-15.

During the 1980 P&M collective bargaining negotiations, however, the ISU demanded and National agreed to changes to the seniority language in the P&M collective bargaining agreement. The new language expressly prevented former bargaining unit members from returning to the P&M bargaining unit if any bargaining unit employee was on company layoff at the time of return and if the return was the result of a reduction in force from the employee's non-bargaining unit position. In addition, the 1980 CBA permitted restoration only of the Company

[3]Prior to 1980, the contract provision addressed only the restoration of Company Seniority upon a return to the bargaining unit. App. A at 21a n. 12. In practice, if an employee was returned to the bargaining unit, he had his Department Seniority restored if he returned to his prior seniority department, had his Sequence Seniority restored if he returned to his prior sequence and had his Job Seniority restored if he returned to his prior job. Whether the returning employee was placed in his old department, sequence or job (and therefore had those catergories of seniority restored) depended on whether the ISU acquiesced to the placement. The ISU's acquiescence to the placement depended on its assessment of whether the restoration of seniority which went along with placement unduly disturbed existing competitive seniority status among employees holding Department, Sequence and Job Seniority in the area where the returning employee sought placement. The district court found the record before it showed that returns to the P&M unit prior to 1980 occurred without there being evidence that company and ISU were not able to agree as to placement. See App. A at 39a-41a.

Seniority which had accumulated before the employee left the P&M bargaining unit; no seniority credit was given for time spent outside the P&M unit. The 1980 P&M CBA became effective on August 1, 1980, although the seniority language became effective on October 1, 1980. *See id.* at 22a n. 15; App. C at 88a-89a.

2. The SNE Bargaining Unit

In the autumn of 1978 the ISU prevailed in an election and was certified by the National Labor Relations Board as the bargaining representative of the Salaried Non-Exempt ("SNE") employees of the Weirton Division. App. A at 9a n.6. National had, prior to this time, unilaterally promulgated its Standard Practice Manual which set forth its employment policies applicable to SNE positions. Among the provisions of the Standard Practice Manual was a section addressing the competitive seniority status of SNE employees, which in its relevant language mirrored the seniority provisions of the pre-1980 P&M CBAs. The first two CBAs between National and the ISU SNE bargaining unit (effective August 30, 1979 and August 1, 1980 respectively) provided that the seniority provisions of the Standard Practice Manual would continue to apply to the SNE bargaining unit until the parties could reach agreement on new seniority language. The contracts obliged National and the SNE unit representatives to continue bargaining over final seniority language during the terms of the agreements. App. A at 25a; App. C at 90a.

Under the Standard Practice Manual and the labor contracts which incorporated it, employees who accepted positions outside the SNE bargaining unit, and thereby forfeited their accumulated SNE bargaining unit seniority, could have that seniority restored, with additional credit

granted for time spent outside the SNE unit, upon return to the SNE unit. As was the case with the pre-1980 P&M contract, however, the SNE agreement did not address the mechanism by which an employee could effect a return to the SNE unit. App. A at 27a-28a.

In March of 1982, National announced its intent to sell the Weirton Division to its employees. *See Sutton*, 724 F.2d at 709. In addition, the effects of the recession had gripped Weirton, prompting the ISU to demand changes to the SNE seniority language to preclude the return of former SNE employees to the SNE bargaining unit. In response to this demand, National agreed on August 24, 1982 to halt returns of former SNE employees into the SNE-bargaining unit, which returns had had the effect of displacing current SNE unit employees with less seniority than that restored to the returning employees. The hiatus on returns continued until September, 1983 when National and the ISU agreed to incorporate seniority language into the SNE collective bargaining agreement which was identical to that contained in the 1980 P&M contract. See App. A at 26a-28a; App. C at 90a.

3. Respondents' Claims and Their Disposition Below

This Petition seeks review of the Fourth Circuit's disposition of breach of contract claims brought by Respondents in Counts 1 and 3 of their Second Amended Complaint. Forty-two of the Respondents are parties plaintiff to Count 1.[4] All forty-two were initially employed as hourly

[4]They are: Arthur Dale White, James Anderson, James H. Baker, Richard S. Barber, Robert L. Billick, Edward Bittner, Harry V. Brown, James H. Browning, James W. Bullock, Edward Dhayer, Ralph Anthony DiBacco, William R. Duncan, Jr., Domenic F. Frio, Dorsey R. Garrett, William F. Garrison, James A. Gracie, III, Thomas M.

(Continued on next page)

workers in the P&M bargaining unit represented by the ISU, and they all accepted salaried management positions outside the P&M bargaining unit before 1980. As indicated, among the allegations in Count 1 is that National promised them that each could return to his former P&M bargaining unit position (i.e., the job he left) with full restoration of his seniority status (i.e., restoration of Company, Department, Sequence and Job Seniority as if he had never left his prior job), in the event of a layoff from his salaried management position or if he wanted to return to the unit for any reason. They claim that "[o]n or about August 1, 1980, and thereafter", National breached their individual employment contracts by "[r]escinding each Plaintiff's right of option to return to an hourly position in the event of reduction in [National's] salaried work force . . . " *See* App. A at 4a-5a (quoting ¶ 73 of the Second Amended Complaint). At the time each Count 1 plaintiff was laid off in 1982 from his salaried management position, National did not return him to a P&M bargaining unit position because the P&M collective bargaining agreement then in effect expressly prohibited such returns. These Count 1 breach of contract claims are premised on the West Virginia law of contracts.

(Continued)

Grishkevich, David R. Harbin, James W. Hazlett, Rena E. Hess, Phillip E. Johnson, Jerry G. Jones, Robert L. Jones, Joseph P. Karas, Bartley R. Kirkbride, David G. Kondik, Frank W. Kruger, Jr., Charles L. Lacey, Ernest H. McCormick, Boley Dale Mermon, Charles D. Murray, Dale E. Poole, Charles Prince, Larry C. Riggle, John R. Selmon, Jr., Ronald L. Spring, Frederick C. Tate, Stephen F. Tucker, Frederick R. Welshans, Charles F. West, Donald L. White and Dominic A. Tedeschi, Jr.

Twelve Respondents remain as parties plaintiff to Count 3 of the Second Amended Complaint.[5] They were all employed in SNE positions and subsequently accepted salaried management jobs.[6] Like their Count 1 brethren, the Count 3 plaintiffs claim that, at the time they accepted salaried management positions, each was promised by National that he could return to his SNE position with full restoration and enhancement of his accumulated Company seniority in the event of layoff from his salaried management position, or at any time. Each claims that on or about August 25, 1982 and thereafter, National breached its individual contracts with them by rescinding this right of return to an SNE position. *See* App. A at 6a; App. C at 90a. National did not return these individuals to their prior SNE bargaining unit positions because of its August 24, 1982 agreement with the ISU to cease such returns. As

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[5]They are: Thomas A. Balon, Larry G. Bell, David S. Bickler, Richard Blancato, Robert A. Bray, Jr., Charles A. Clark, Timothy C. Lawson, Robert J. Ryan, Jr., John S. Sciance, Kenneth M. Seiple, Dennis D. Shirer and Hoy L. Van Horn. Summary judgment was entered on the claims of three other Count 3 plaintiffs (Joseph W. Mayernick, Patricia Mlodzik and William Riggs) on state law grounds. App. B at 73a. The Fourth Circuit affirmed this disposition of their claims and accordingly they are not before this Court.

[6]Of this group, eight (Larry G. Bell, David S. Bickler, Richard Blancato, Timothy C. Lawson, William B. Riggs, John S. Sciance, Dennis D. Shirer and Hoy L. Van Horn) accepted salaried management positions before the ISU was certified as representative of the SNE bargaining unit. One (Thomas A. Balon) accepted his salaried management position after the ISU's certification but before the initial collective bargaining agreement was executed. The three remaining Count 3 plaintiffs accepted their salaried management positions after the ISU and National had agreed to incorporate the Standard Practice Manual's seniority provisions into the collective bargaining agreement for the SNE bargaining unit, but before the August 25, 1982 agreement with the ISU to freeze returns of former SNE employees to the SNE unit. *See generally*, Answer to Second Amended Complaint.

is the case in Count 1, the claims made in Count 3 for breach of contract are prosecuted as state law claims.

National contended that §301 pre-empted these Count 1 and Count 3 breach of contract claims brought under state law. National argued both that these claims arose out of the seniority provisions of P&M and SNE CBAs and that the claims were substantially dependent on analysis of the terms of these CBAs. National also urged that the claims should be characterized as federal claims under §301 because they interfered fundamentally with the collective bargaining relationship between National and ISU. On National's motion for summary judgment on the pre-emption issues, the district court determined that the Count 1 claims were preempted both because analysis of the claims required interpretation of the P&M CBA and because the claims were in direct conflict with the terms of the 1980 P&M agreement. *See* App. A at 24a-25a. The district court entered final judgment on this ruling pursuant to Rule 54(b) of the Federal Rules of Civil Procedure. App. B at 79a. In contrast, the district court ruled that the Count 3 claims were not preempted. The court first held that the August 24, 1982 agreement between National and the ISU SNE unit freezing returns did not amend the SNE CBA. Absent effective amendment, the court concluded that the SNE agreement in effect at the time of the layoffs did not address the right of Respondents to return to SNE positions, but rather only addressed the competitive seniority status of employees after such a return. The district court held that the claims for return to the SNE unit did not conflict with the current SNE agreement and were therefore not preempted. App. A at 27a-30a. The court did not address National's argument that preemption of the Count 3 claims was compelled because resolution of the

claims was substantially dependent on analysis of the terms of the SNE CBAs. The district court certified its ruling on Count 3 for interlocutory appeal pursuant to 28 U.S.C. §1292(b). App. B at 81a.

On appeal, the Fourth Circuit reversed the district court's disposition of the Count 1 claims, and affirmed on other grounds that court's resolution of the Count 3 claims. In National's view, the Fourth Circuit's analysis of the preemption issues raised by these two counts is based on an imperfect application of the preemption principles announced by this Court.

The Circuit Court, after first reviewing this Court's seminal rulings on §301 preemption, concluded that the claims at issue here are "independent of any collective bargaining agreement", App. C at 98a, and so not preempted. The court accepted Respondents' contention that the sources of the rights asserted are "independent oral contracts of employment that do not rely on the terms of any collective bargaining agreement", *id.*, and rejected National's argument that these rights "are either actually founded in or 'inextricably intertwined' with collective bargaining agreements and thus preempted by §301." *Id.* at 99a. Acceptance of the Respondents' characterization of their claims as "independent" of any collective bargaining agreement precluded, in the court's view, the conclusion that the claims were preempted by §301. *Id.*

On a second level of analysis, the Fourth Circuit considered National's argument that, in matters implicating the relationship between employers and employees in a collective bargaining context, federal labor law should define the obligations of the parties and hence, the liabilities which result from breach of those obligations. National's argument was premised on the fact, undisputed

by Respondents, that the subject of the contracts they seek to enforce at state law are specific positions within the relevant ISU bargaining units and the collectively bargained seniority entitlements on which their ability to hold those positions is ultimately founded. The court, while acknowledging that "National's arguments are founded on strong principles of federal labor law", *id.* at 103a, nevertheless rejected them. Relying principally on this Court's decisions in *J.I. Case Co. v. NLRB*, 321 U.S. 332 (1944) (as construed in *Caterpillar, Inc. v. Williams*, 482 U.S. 386 (1987)) and *Belknap, Inc. v. Hale*, 463 U.S. 491 (1983), the circuit court held that "[e]mployees who have made valid individual contracts that conflict with subsequent federal labor agreements, and thus cannot be specifically enforced, are still free to bring damage claims against their employer for breach of contract." App. C at 104a. The court concluded that because Respondents sought only damages for the alleged contract breaches, and not reinstatement to bargaining unit positions, no principles of federal labor law would be compromised. *Id.* at 105a. The court thus found it unnecessary to decide whether the August 24, 1982 agreement between National and the ISU freezing returns to the SNE unit was an effective amendment of the SNE collective bargaining agreement. *Id.* at 107a n. 2. The case was remanded to the district court for application to Respondents' claims of the proper West Virginia evidentiary standard governing contract claims. *Id.* at 120a.

REASONS FOR GRANTING THE WRIT

This Court has not considered the extent of §301's preemptive effect on the state law claims of non-bargaining unit employees alleging breach of individual contracts to return them with seniority to their former bargaining unit positions. The Fourth Circuit's decision on this difficult

issue misapplied the preemption principles announced by this Court and is inconsistent with the decisions of a number of lower courts on similar facts. The writ should be granted to clarify this important area of federal labor law and to resolve the conflicting lower court approaches to the problem.

A. Respondents' State Law Claims Are Not Independent of the Collective Bargaining Agreements

The fundamental task of a court analyzing the defense of preemption by §301 is to determine if the claim is independent of the collective bargaining agreement. *E.g., United Steelworkers of America v. Rawson*, 110 S.Ct. 1904, 1910 (1990); *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399, 407 (1988); *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 396 (1987); *Electrical Workers v. Hechler*, 481 U.S. 851, 859 (1987); *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 213 (1985). Two analytical approaches to the preemption inquiry can be gleaned from these cases. The first examines the source or origin of the right which is the basis of the claim, and results in preemption by §301 where the claim has its source in, or arises out of, the collective bargaining agreement or relationship. *Caterpillar*, 482 U.S. at 394; *Allis-Chalmers*, 471 U.S. at 213. The second approach focuses on whether resolution of the state law claim is dependent on analysis or interpretation of the collective bargaining agreement, or is inextricably intertwined with it. *Hechler*, 481 U.S. at 862; *Allis-Chalmers*, 471 U.S. at 213. A claim is independent of a collective agreement, and hence not preempted by §301, only if it does not derive from and does not require interpretation of or reference to the agreement.

Although the Fourth Circuit correctly identified the threshold issue presented in this litigation, its conclusion that Respondents' claims are independent of the CBAs is too facile. The court concluded that "the duties National allegedly assumed are defined by the terms of the individual employment contracts and not by a collective agreement." App. C. at 15. That is, the alleged oral promises were made by management representatives during an interview for promotion out of the bargaining units and the oral promises made no mention of the CBAs. This conclusion, however, ignores the reality that Respondents' state claims seek the benefit of the bargaining agreements as they existed prior to the amendments that prevented their return to the bargaining units. The circumstances involved in this case are vastly different from those found irrelevant to the preemption analysis by the *Lingle* Court. In *Lingle*, the fact that "the state-law analysis might well involve attention to the same factual considerations as the contractual determination" did not render "the state-law analysis dependent on the contractual analysis." *Lingle*, 486 U.S. at 408. This was so because Lingle's state claim existed regardless of her status as a union employee. Here, the Fourth Circuit has sanctioned the use of state contract law to enforce damage claims of entitlement to positions within a collective bargaining unit.

The circuit court's conclusion glosses over the gravamen of Respondents' action: they demand application to each of them of the seniority provisions of the collective agreement. Respondents themselves recognized, during the summary judgment proceedings in the district court, that

> [i]mplicit in the promise that a foreman could return to his former position was that he would return with

> his full seniority restored. It is axiomatic that a foreman could only return to his former position if his full seniority was restored. The right to hold a specific position in the hourly or non-exempt [SNE] ranks is dependent upon an employee's job, sequence, department and Company seniority. Thus, if a plaintiff returned with no seniority, he would not be able to hold his former position.

Plaintiffs' Brief In Opposition To Defendant's Motion For Summary Judgment, at 113. The Fourth Circuit apparently deemed it legally irrelevant that Respondents' state damage claims depended upon restoration of bargaining unit seniority. But bargaining unit seniority is a type of entitlement that is "without existence independent of the collective-bargaining agreement." *Rawson*, 110 S.Ct. at 1909. *See Aeronautical Ind. Dist. Lodge 727 v. Campbell*, 337 U.S. 521, 525-526 (1949); *Ulrich v. Goodyear Tire & Rubber Co.*, 884 F.2d 936, 938 (6th Cir. 1989); *Cooper v. General Motors Corp.*, 651 F.2d 249, 249 (5th Cir. 1981); *Kern v. United Steelworkers*, 669 F.Supp. 701, 704 (M.D.Pa. 1987). The seniority rights Respondents seek to enforce through damages at state law in this action derive from CBAs, and so are not independent of those agreements.

This is not a case such as that presented in *Lingle*, where a state law right and remedy, available regardless of whether the party asserting the right is covered by a collective bargaining agreement, was found not to be preempted. Instead, the claims here are by their very nature ultimately premised on a collective bargaining agreement containing provisions that Respondents perceive as providing them greater job security. They thus relate to the CBAs, in the sense that they have "a connection with or reference to" the agreements, *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85,

97 (1983), and are not independent of those agreements. National argued below that, because the Respondents' claims "related to" the collective bargaining agreements in the sense contemplated by the use of that phrase in §514(a) of ERISA, 29 U.S.C. §1144(a), those claims could not be independent of the CBAs. Although this Court has frequently noted that the preemptive scope of ERISA and of §301 are co-extensive, *e.g., Ingersoll-Rand Co. v. McClendon*, 111 S.Ct. 478, 485-486 (1990); *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 64-65 (1987); *Pilot Life Ins. Co. v. Dedaux*, 481 U.S. 41, 54-55 (1987), the Fourth Circuit rejected *sub silentio* National's argument. In *McClendon*, the fact that the state law claim did not exist in the absence of the employer's pension plan resulted in the conclusion that the state cause of action related to the pension plan, and so was preempted. 111 S.Ct. at 483-484. The same result should obtain here; Respondents have no claims in the absence of the collectively bargained seniority from which they seek to benefit.

Finally, although this Court has noted that employees are not necessarily disabled from enforcing individual contracts when their terms and conditions of employment may also be affected by collective agreements, *e.g., Caterpillar*, 482 U.S. at 394, it has never specifically addressed how claims based on purported individual contracts are to be analyzed when those claims implicate CBAs to the extent that these claims do. *Caterpillar* suggests, however, that where the individual contract claims "rely upon the collective agreement indirectly, . . . [or] address the relationship between the individual contracts and the collective agreement", *id.* at 395, preemption by §301 is required. *Allis-Chalmers* contains a similar suggestion:

> Nor do we hold that every state law suit asserting a right that relates in some way to a provision in a collective bargaining agreement, or more generally to the parties to such an agreement, necessarily is pre-empted by §301. The full scope of the pre-emptive effect of federal labor-contract law remains to be fleshed out on a case-by-case basis.

471 U.S. at 220. As demonstrated above, Respondents' claims here do at least indirectly rely on the terms of the CBAs and therefore require analysis of the relationship between the individual contracts and the CBAs. That reliance, even taken alone, should be sufficient to demonstrate that these claims are not independent of the CBAs. Moreover, any analysis of the effect of the individual contract claims on the collective agreements must be undertaken in conformity with the principles of federal labor law if that law is to retain its vitality.

Certiorari should be granted to clarify whether the claims made by Respondent are truly "independent" of the parallel provisions of the collective agreements.

B. Principles of Federal Labor Law Preclude Maintenance Under State Law of Respondents' Claims

As earlier indicated, the Fourth Circuit rejected National's argument that Respondents' state law claims interfered with the relationship between National and the ISU and should be preempted on that basis. The court misconstrued National's argument, stating that it "would have us declare plaintiffs' individual contracts null and void as a result of subsequent bargaining agreements that limited their right to return to the unit". App. C at 103a. In actuality, National's argument required no such draconian

result. Rather, National urged only that these claims could not be enforced pursuant to state law contract principles, but instead must be characterized as federal claims under §301 and be resolved by reference to federal labor policy and the federal common law developed thereunder.

The jurisdictional reach of §301 is undoubtedly broad enough to encompass the claims made here. In *Textile Workers v. Lincoln Mills*, 353 U.S. 448 (1957) this Court observed that §301 encompasses "[o]ther problems [which] lie in the penumbra of express statutory mandates. Some will lack express statutory sanction but will be solved by looking at the policy of the legislation and fashioning a remedy that will effectuate that policy. The range of judicial inventiveness will be determined by the nature of the problem." 353 U.S. at 457. Respondents' claims here occupy the "penumbra" of §301 referred to by the *Lincoln Mills* Court. They should be characterized as federal claims and resolved by reference to federal labor policy.

The Fourth Circuit declined to recharacterize Respondents' claims under federal law, concluding that because they sought only damages and not reinstatement, no principles of federal labor law were compromised. App. C at 105a. Respondents have steadfastly held to their position that they asserted state law, not federal law, claims. The circuit court also observed that the claims did not threaten the "federal policy of promoting arbitration of labor disputes" because the claims were not grounded in the CBAs. *Id.* at 105a-106a. The Fourth Circuit's focus was too narrow.

It is settled that whether a claim is properly characterized as arising under federal or state law has nothing to do with the type of remedy sought. "The nature of the relief

available after jurisdiction attaches is, of course, different from the question whether there is jurisdiction to adjudicate the controversy . . . [T]he breadth or narrowness of relief which may be granted under federal law in §301 cases is a distinct question from whether the court has jurisdiction over the parties and the subject matter." *Avco Corp. v. Aero Lodge 735*, 390 U.S. 557, 561 (1968). *See also Caterpillar*, 482 U.S. at 391 n. 4; *William E. Arnold Co. v. Carpenters District Council*, 417 U.S. 12,18-19 (1974). *Cf. Ingersoll-Rand Co. v. McClendon*, 111 S.Ct. at 481, 486 (fact that plaintiff sought damages instead of pension benefits immaterial to preemption analysis).[7] Thus, to the extent the Fourth Circuit's conclusion that Respondents' claims are not preempted turns on the fact that only damages are sought as remedy, it is undoubtedly incorrect.

Second, while it cannot be gainsaid that one principle underlying this Court's preemption jurisprudence is preservation of the role of arbitration in the resolution of contractually based labor disputes, *Allis-Chalmers*, 471 U.S. at

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[7]National also argued that the demand for damages itself required interpretation of the seniority provisions of the collective agreements. The measure of damages for breach of the contracts alleged by Respondents would be the wages attendant to the bargaining unit position each would have held had he been returned. As noted, the ability to hold positions within the bargaining unit is a function of the Company, Department, Sequence and Job seniority conferred by the collective bargaining agreement. The seniority provisions of the agreements would thus have to be interpreted and applied in order for Respondents to prove damages. National argued that the necessity for such interpretation rendered Respondents' claims more than "tangentially" related to the collective bargaining agreements, and required their preemption because they are "inextricably intertwined with consideration of the terms of the labor contract." *Allis-Chalmers Corp.*, 471 U.S. at 211, 213. *See also Lingle*, 486 U.S. at 407 n. 7 (noting that remedy which requires contract interpretation would be preempted). The circuit court rejected *sub silentio* this argument.

219, it is not the only principle applicable. *Cf. Groves v. Ring Screw Works*, 111 S.Ct. 498 (1990) (breach of contract suit may be maintained under §301 even in absence of contractual agreement to arbitrate). Section 301 also provides and authorizes the development of the substantive law governing "the relationships created by [a collective bargaining] agreement," *Allis-Chalmers*, 471 U.S. at 211 (quoting *Bowen v. United States Postal Service*, 459 U.S. 212, 224-225 (1983)), even where contract language need not be interpreted. *See United Steelworkers of America v. Rawson*, 110 S.Ct. 1904 (1990) (§301 controls relationship between union and its members, displacing state tort law). Here, the CBAs created an ongoing relationship among Respondents (former bargaining unit members), National and the ISU. That relationship was the subject of collective bargaining between National and the ISU. Respondents seek to exercise their alleged contractual rights in a manner inconsistent with the CBAs. Their ability to do so must be determined under federal labor law in order to accommodate that law's policy concerns. See *Allis-Chalmers*, 471 U.S. at 213 ("If the state . . . law purports to define the meaning of the contract relationship, that law is preempted").

Respondents' circumstances in this case are analogous to those of the retirees addressed by this Court in *Chemical Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157 (1971) ("*PPG*"). There, it was held that although collective bargaining over benefits payable to retirees was not mandatory, because retirees were not employees within the meaning of §2(3) of the National Labor Relations Act, 29 U.S.C. §152(3), it nevertheless was permissible for the employer and the union to bargain over such benefits. This Court noted that the retirees would "have a federal remedy

under §301" for any breach of the collective agreement setting forth the benefits to which they were entitled, 404 U.S. at 181 n. 20, despite the fact that they were not members of the bargaining unit covered by the collective bargaining agreement. Nothing in the *PPG* decision indicates that the retirees could avail themselves of state law actions and remedies to establish their contractual entitlements. *Cf. United Auto Workers v. Yard-Man, Inc.*, 716 F.2d 1476, 1479 (6th Cir. 1983), *cert. denied*, 465 U.S. 1007 (1984) ("Clearly the parties to a collective bargaining agreement may provide for rights which will survive termination of their contractual relationship . . . Any such surviving benefit must necessarily find its genesis in the collective bargaining agreement").

Here, much like the situation in *PPG*,[8] the rights Respondents' seek to assert are undeniably addressed in collectively bargaining agreements. Their initial complaint in this matter went so far as to allege that they were third party beneficiaries to these labor contracts. Whether their claims retain vitality after the subsequent amendments to the CBAs precluded their ability to return to the bargaining units should, as a matter of federal labor policy, be determined by application of the federal common law of labor relations. See *Allis-Chalmers*, 471 U.S. at 211 ("questions relating to what the parties to a labor agreement agreed, and what legal consequences were intended to flow from breaches of that agreement, must be resolved by reference

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[8]One distinction between the instant case and the *PPG* decision lies in the fact that the seniority provisions of the agreements at issue here were, in all likelihood, mandatory subjects of bargaining. This is so because when returns to the unit were effected thereunder, the effect of such returns was "the replacement of employees in the existing bargaining unit with [others] to do the same work under similar conditions of employment." *Fibreboard Corp. v. NLRB*, 379 U.S. 203, 215 (1964).

to uniform federal law . . . "); *Caterpillar*, 481 U.S. at 395 (suggesting that claims which "address the relationship between the individual contracts and the collective agreement" should be decided under federal law). *See also Ulrich v. Goodyear Tire & Rubber Co.*, 884 F.2d 936, 938 (6th Cir. 1989).

The Fourth Circuit's reliance on *Belknap, Inc. v. Hale*, 463 U.S. 491 (1983) and *J.I. Case Co. v. NLRB*, 321 U.S. 332 (1944) in support of its contrary conclusion was misplaced. *Belknap* is both factually and legally distinguishable. That case, relying in part on *San Diego Building Trades Council v. Garmon* 359 U.S. 236 (1959), held that the National Labor Relations Act did not preempt state contract claims brought by permanent strike replacements who lost their jobs to reinstated strikers. *Belknap* simply did not consider the defense of §301 preemption. Moreover, as this Court's subsequent decisions in *Allis-Chalmers* and its progeny make plain, the preemptive scope of §301 is far more broad than that of the National Labor Relations Act. Indeed, the pre-emptive doctrine cases such as *Garmon* and *Belknap*, which are based upon the exclusive jurisdiction of the National Labor Relations Board, are " 'not relevant' to actions within the purview of §301." *William E. Arnold Co. v. Carpenters*, 417 U.S. at 16 (quoting *Teamsters v. Lucas Floor Co.*, 369 U.S. 95, 101 n. 9 (1962). *See also Allis-Chalmers*, 471 U.S. at 213 n. 9.

Nor does *J.I. Case* support the Fourth Circuit's decision, for it leaves unanswered the central question presented here. In *J.I. Case*, this Court stated that individual contracts "cannot subtract from collective ones, and whether under some circumstances they may add to them in matters covered by the collective bargain, we leave to be

determined by appropriate forums under the laws of contracts applicable, and to the Labor Board if they constitute unfair labor practices." 321 U.S. at 339. National, of course, contends that the "laws of contracts" applicable to Respondents' claims are federal laws, and the *J.I. Case* decision does not indicate otherwise.

Federal labor law should govern resolution of Respondents' claims, since those claims impact directly on the collective agreements made between National and the ISU. The writ of certiorari should be granted to reassert the primacy of federal labor law over issues affecting the relationship of the parties to CBAs.

C. The Lower Courts Are Divided On the Preemption Issues Raised In This Petition

The lower courts have wrestled with the question of the proper resolution of the claims of former bargaining unit employees who assert rights attendant to their former bargaining unit status. The decisions are not homogenous.

The decision of the Fourth Circuit in the instant case is directly in conflict with that of the Sixth Circuit in *Ulrich v. Goodyear Tire & Rubber Co.*, 884 F.2d 936 (6th Cir. 1989). In *Ulrich*, the Sixth Circuit found claims identical to those presented here preempted:

> We conclude that the District Court erred in holding the plaintiffs' so-called "state law" claims were not preempted by federal law. Plaintiffs' request for return to the bargaining unit and for seniority rights upon return depends on rights created by the CBA. The allegedly "common practice" of allowing free transfer to and from the bargaining unit on which plaintiffs rely relates to the manner in which the CBA was

> enforced and the practices and customs of the workplace. Broadly speaking, the question depends upon an interpretation of the CBA. The decision of the District Court on plaintiffs' separate "state law" claims turned on a determination that the language of the CBA itself did not create an automatic right to return to the bargaining unit. The existence of the plaintiffs' so-called "state law claim" is inextricably intertwined with the CBA.

884 F.2d at 938. The *Ulrich* court remanded the case to the district court for a "ruling on the merits of their contract and promissory estoppel claims as a matter of federal common law." *Id.*

The Third Circuit, in a divided opinion, came to a hybrid solution in *Malia v. RCA Corp.*, 794 F.2d 909 (3d Cir. 1986), *cert. denied*, 482 U.S. 927 (1987). The court held that the plaintiff could enforce his alleged promise to return to the bargaining in a state law contract claim because the relevant bargaining agreement did not specify the mechanism under which a former bargaining unit member could effect a return. 794 F.2d at 912. Once returned, however, the plaintiffs' seniority status within the unit would be determined "on the terms and conditions of employment set forth in the collective bargaining agreement." *Id.* at 913. In dissent, Judge Becker would have viewed the entire claim as one arising under the collective bargaining agreement, stating that:

> [A]ny close question about the scope of the coverage of the collective bargaining agreement should be resolved in favor of a broad reading because strong federal policy interests support such coverage. If an issue is covered by a collective bargaining agreement, it not only falls within federal jurisdiction, but, assuming the agreement contains on arbitration provision, it

> is resolved in the first instance by an arbitrator. Thus, a conclusion that an issue is governed by the collective bargaining agreement furthers "interpretive uniformity and predictability", *Allis-Chalmers*, 105 S.Ct. at 1999...

Id. at 914 (Becker, J., dissenting). The dissent further noted that "although the oral contract did, for the most part, pertain to the position of inventory supervisor, the single term that Mr. Malia is seeking to enforce—reinstatement to his former position—is one that not only impinges upon the bargaining unit, but is provided for in the collective bargaining agreement." *Id.* at 915. The dissent would thus have found the claim preempted.

In *Berda v. CBS, Inc.*, 881 F.2d 20 (3d Cir. 1989), *cert. denied*, 110 S.Ct. 879 (1990) the court considered the "circuit-splitting question" of whether state law claims based upon alleged misrepresentations of job security, "made before the employee became a member of the bargaining unit, which conferred additional rights to those afforded by the collective bargaining agreement, are preempted by section 301." 881 F.2d at 20. Berda's claims were premised on alleged representations that his employment with CBS "would be guaranteed for the reasonably foreseeable future." *Id.* at 21. Berda accepted the position with CBS, became a member of the bargaining unit representing CBS's employees, and was laid off in accordance with the terms of the bargaining agreement five months later. *Id.* The Third Circuit, relying on *Caterpillar* and *J.I. Case*, held that Berda stated valid state law claims because those claims were not dependent on an interpretation of the bargaining agreement. *Id.* at 26. The *Berda* court noted, however, that unlike the situation presented here, it was "not currently presented with the question whether the

existence of a subsequent collective bargaining agreement may constitute a defense to Berda's contract claim under state or federal law." *Id.* (footnote omitted).

Redmond v. Dresser Industries, Inc., 734 F.2d 633 (11th Cir. 1984) found preempted the plaintiff's state law claims of, *inter alia*, contract breach to return to his former bargaining unit position. *Holland v. National Steel Corp.*, 791 F.2d 1132 (4th Cir. 1986), a case arising out of the Weirton plant during the same period of lay off which gave rise to this litigation, found the plaintiff's claim for return to the bargaining unit preempted. In both cases, the courts determined that the source of the rights claimed was the collective bargaining agreement provision addressing the issue of returns, despite both plaintiffs' protestations that they were asserting individual contracts. See *Redmond*, 734 F.2d at 635; *Holland*, 791 F.2d at 1134.

In *Kern v. United Steelworkers of America*, 669 F.Supp. 701 (M.D.Pa. 1987) the court found preempted plaintiff's state contract claim for return to the unit despite accepting the argument that the claim was not inconsistent with the governing collective bargaining agreement:

> If employees were free to negotiate and enforce separate oral agreements identical to the collective bargaining agreements under which they labored, and then if they were permitted to enforce these oral agreements under state law, much of the federal concern for swift resolution of disputes through grievance and arbitration procedures, or through immediate court intervention, and for consistent interpretation of contract terms would be undermined. Plaintiffs would be free to rely on longer statutes of limitations, and they would be free to ignore grievance/arbitration procedures. The uniform federal common law growing out

> of the Labor Management Relations Act that courts have been so careful to protect would be circumvented and ineffectual.

669 F.Supp. at 704.

As evident from the foregoing decisions, the lower courts have developed varied approaches to treatment of claims such as those presented in the instant case. This Court has not addressed the preemptive scope of §301 on the claims of non-bargaining unit employees seeking to enforce at state law contracts to return to the bargaining unit. Certiorari should be granted to resolve this conflict in the lower courts.

CONCLUSION

For the foregoing reasons, Petitioner National Steel Corporation requests that its Petition for Writ of Certiorari be granted.

Respectfully submitted,

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